

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN EARL CASTELL,

Defendant-Appellant.

UNPUBLISHED

March 13, 2008

No. 276270

Saginaw Circuit Court

LC No. 06-027834-FH

Before: O’Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 36 months to 15 years in prison. For the reasons set forth in this opinion, we affirm.

Defendant first argues that he should not have been sentenced as a habitual offender because plaintiff did not provide him notice of the habitual offender enhancement within 21 days of sentencing.

The prosecuting attorney is required to provide written notice of intent to seek a habitual offender enhancement within 21 days of the defendant’s arraignment by personal service of the notice on the defendant or the defendant’s attorney. MCL 769.13(1)-(2); *People v Morales*, 240 Mich App 571, 575; 618 NW2d 10 (2000). Defendant acknowledges that the record reflects that he was arraigned on August 9, 2006, and that the notice of intent to seek habitual offender enhancement was filed with the trial court on August 21, 2006, i.e., within 21 days of arraignment. However, defendant submitted an affidavit in which he claimed that he was never personally served or made aware of the prosecutor’s enhancement by the prosecutor or his own attorney. But defendant’s trial attorney stated in an affidavit that he received the habitual offender notice pursuant to MCL 769.13 on August 23, 2006, which was within 21 days of arraignment. Thus, regardless of what defendant’s attorney may or may not have communicated to defendant, the uncontradicted evidence of the date of the arraignment and filing of the habitual offender notice with the trial court, and the averment of defendant’s trial attorney as to the date he received the notice, establish that plaintiff provided the notice within 21 days after arraignment, as required. The trial court did not err in denying defendant’s motion to vacate his sentence based on this issue.

Defendant also argues that the trial court abused its discretion in denying his request for removal of his trial counsel prior to trial based on trial counsel's failure to meet with him and prepare for trial. We disagree.

We review a trial court's decision regarding a defendant's right to counsel of choice for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003).

At the beginning of the first day of trial, defendant effectively requested an adjournment to allow him time to retain alternative trial counsel based on his expressed dissatisfaction with his appointed counsel. While the Sixth Amendment guarantees an accused a right to retain counsel of choice, this right is not absolute. *Akins, supra* at 557. Rather, "[a] balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated." *Id.* (citations omitted). In reviewing a trial court's denial of a defendant's motion for a continuance to obtain another attorney, the following factors are considered:

(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Id.* (citation omitted).]

The first factor weighs in defendant's favor because he was in effect asserting a constitutional right to retain his own counsel. The second factor arguably weighs in defendant's favor as well, because his expressed inability to communicate with trial counsel in the pre-trial period seems to be a legitimate reason for defendant to have wanted different counsel. However, the third factor weighs heavily against defendant because, given that defendant was free on bond pending trial, he was negligent in not having sought to retain alternative counsel or to have brought his alleged inability to communicate with counsel to the trial court's attention prior to the date scheduled for trial to begin. Further, under these circumstances, it is reasonable to infer with regard to the fourth factor that defendant did not raise this issue until the beginning of the first day of trial because he wished to delay the trial. Finally, as to the fifth factor, defendant has not articulated any prejudice from trial counsel representing him at trial. Given that the majority of the factors weigh against a finding that the trial court abused its discretion in refusing to adjourn the trial to provide more time for defendant to retain alternative counsel, and that it was eminently reasonable to expect a defendant who was free on bond and evidently wished to retain alternative counsel to seek to do so before the first day of trial, the trial court did not abuse its discretion in refusing defendant's request to delay the trial.

Affirmed.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher